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OIL AND GAS ARBITRATION IN THE MIDDLE EAST

Stabilization Clauses: Do They Have a Future?

Peter D. Cameron*

ABSTRACT

There are three pillars of legal stability in international oil and gas investments: stabilization clauses, expectations of a stable legal framework under an investment treaty and guarantees set out in the host state's domestic legislation. The diverse and pervasive character of stabilization clauses in investment agreements makes them the most important in practice. This article reviews their resilience alongside the other two pillars and concludes that they retain significant advantages. Even in a wider context of policies favouring a lower carbon consumption in the energy sector, and consequent long-term change, such clauses are likely to remain a continuing feature of investment agreements as a legal response to investors' needs for predictability in making long-term commitments.

1 INTRODUCTION

Rapidly changing energy markets, evidenced by sharp falls in the stock of the most established international oil companies, pandemic impacts on demand and daily media reporting on a historical shift to lower carbon usage in the global economy, invite us to ask what future, if any, stabilization clauses have as the guardians of stability in long-term energy contracts?

The answer need not involve an exercise in speculation since the future of stabilization clauses has already been questioned, implicitly at least, by the growth of alternative ways of providing legal stability to investors. Such clauses have already evolved considerably as risk allocation mechanisms between investor and host state. Further, they operate alongside the legal protection offered to investors by international investment treaties, as well as protections embedded in domestic laws. Taken together, we might call these protections the three pillars of legal stability in international investment law, each one with a different character. In this context of enhanced choice for investors, we may ask whether, over time, the

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contract-based clauses have become less effective or less necessary? A more speculative question about stabilization clauses is whether, given the abundant economic and health problems in the 21st century that require flexibility in public policy, and the need for states to implement their commitments to reduce CO_2 emissions under the Paris Agreement, clauses that seek to stabilize a bargain struck between international investors and host states for the next 20 to 30 years make any sense? For states, they surely impose unacceptable constraint on their freedom to regulate, and for investors they may limit their ability to respond to the unprecedented uncertainty that they face in energy markets.

This article responds to the first of these questions by examining the three legal pillars of investment stability, concluding that stabilization clauses are likely to remain with us for some time to come, partly because they have become diverse and flexible in character, and partly because they still enjoy significant advantages over the alternatives. The long-term cooperation between states and investors that they presuppose is as urgent today as it was in decades past, especially since the objectives of each of them – and perhaps especially of states – have become more complex and challenging than ever before. Subsequently, the article makes a brief exploration of the future of stability mechanisms in the context of rapidly changing energy markets.

Although there is already a very substantial literature on stabilization clauses, recent years have seen a significant expansion in contract transparency, allowing contemporary scholars an opportunity to examine a much wider range of contracts than was available to those in the past. Conclusions drawn are likely to have surer foundations as a result. With respect to investment treaty awards, the role of ICSID in publishing arbitral awards it has administered and of other websites dedicated to their publication means that there is a rich supply of data on stabilization clauses to the extent that they have figured in oil and gas disputes. This trend towards greater transparency has been enhanced further by publication of hitherto confidential awards through enforcement proceedings before national courts.

2 HOW ARE STABILIZATION CLAUSES WORKING TODAY?

2.1 What Is a Stabilization Clause?

The inclusion of a clause or clauses on stability has long been a common practice in the basic contracts reached by investors and host states in the international energy industry, originating from as far back as the early 1930s. Its starting point was a concern by international investors that a host state might unilaterally nationalize their assets as had been done in parts of Latin America, and later in the

Middle East and North Africa. Although there are multiple ways in which contract stabilization may be achieved, the essential idea is the same: the parties to the agreement seek to provide contractual assurance that the investment terms at its core on the date of signature will remain the same over the life of the agreement unless they have agreed otherwise. Essentially, the parties are seeking to secure by law both the economic terms and the ability to implement the project on a commercial basis. Sometimes the scope of the investment terms may be defined narrowly to comprise only fiscal matters; states may prefer to limit it to fiscal matters and set out a list of the taxes and levies that are covered by it. Others may permit a wider scope but insist on a 'carve-out' of matters such as public health, safety, environment and national security. For many investors, a wider formulation tends to be the preferred option, including the right to monetize (which may include the right to export products, and sell interests in the investment), the right to develop a petroleum discovery deemed to be commercial, an exchange regime (to keep payments in hard currency, repatriate funds outside the host state and make payments) and the governance of the project itself. Behind this choice of scope will be the concern about a host state's many levers within as well as outside the contract to 'persuade' the investor that a change in fiscal terms should be accepted. If, for example, the host state's authority to approve an investor's development plan for a petroleum discovery is unfettered, it could be used to tie a grant of approval to increased fiscal obligations and other conditions such as state participation. Conversely, the scope of the clause may be defined in an asymmetric or dynamic way to capture future benefits from changes in the legal and fiscal regime to the advantage of the investor.

If a working definition of stabilization is required, the following may suffice:

> in the context of an international energy contract, the term stabilization applies to all of the mechanisms, contractual or otherwise, which aim to preserve over the life of the contract the benefit of specific economic and legal conditions which the parties considered to be appropriate at the time they entered into the contract.[1]

In many agreements, references to the parties' aim of maintaining the relationship which prevailed at the time of signature of the contract are explicitly provided. However, quite often, the term 'stabilization' is applied less to the exclusion of future legislative acts that may adversely impact on that relationship

1 Peter D Cameron, *International Energy Investment Law: the Pursuit of Stability* (Oxford: Oxford University Press, 2010), 69. The purpose is not necessarily to subject an IOC to all relevant legal conditions that prevail at the time the agreement is concluded since the parties may wish to provide that the host government shall exempt or protect the IOC from the application of certain laws that are in fact applicable as of the date at which the agreement was concluded. Further, the "specific economic and legal conditions" may include an adaptation condition: the investor and/or state may benefit from changes that occur in the wider fiscal environment during the life of the contract.

than to the provision of mechanisms which can manage the impacts of any new legislation (a change in law) on the contract.

2.2 Which Stabilization Clause?

If a host state decides to offer stabilization in an energy investment agreement, there are a variety of ways in which it can do so. Many commentators have sought to classify the various kinds of clause typically found.[2] International practice is highly diverse and is not standardized. In this section four principal types of contract stabilization available to investors in the international petroleum industry are described and briefly examined. In practice, there may be several forms of stabilization in the same contract, an outcome the parties can agree to as a result of what are usually lengthy, complex negotiations.

Freezing The most familiar (and possibly notorious) kind of stabilization clause is usually known by its legal effect as a 'freezing' clause. In its strictest form, such a clause prohibits the host state from changing its laws, and in a sense 'handcuffs' the host state so that it cannot exercise its sovereign rights to change its laws. In this way the investor creates an enclave arrangement for itself. Alternatively, it may seek to prevent the host state from applying changes in the host state's law made after the effective date of the contract to the specific investment contract. Such an approach would aim to limit the legislative competence of the host state with regard to the contractual relationship between the parties in order to secure the investment under discussion. The state may not act to amend or abrogate the contract in question. Alternatively, the contract may be granted an enclave status by making it exempt from any legal changes occurring in the wider legal regime of the host state. In effect, the parties 'freeze' the law governing the parties' contract, by limiting it to the legislation of the host state on the effective date of the petroleum contract. One commentator concludes that this "cannot be considered as *lex contractus*" and is better viewed as a "system of

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[2] Piero Bernardini, 'The Renegotiation of the Investment Contract', *ICSID Review—Foreign Investment Law Journal* 13, no. 2 (1998): 411–425; and 'Stabilisation and Adaptation in Oil and Gas Investments', *JWELB* 1 (2008): 98–112 at 100–101; Abdullah Al Faruque, 'Typologies, efficacy and political economy of stabilization clauses: A critical appraisal', *Transnational Dispute Management* 4(5), no. 1 (2007): 30–32; Ian Brownlie, *Public International Law,* 7th ed (Cambridge: Cambridge University Press, 2008), 550–551; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* 2nd ed (Oxford: Oxford University Press, 2013), 82; M. Sornarajah, *The International Law on Foreign Investment* (2004) 407; Esa Paasivirta, 'Internationalisation and Stabilisation of Contracts versus State Sovereignty', *BYIL* 60 (1989): 315 at 323; and Peter D Cameron, 'Reflections on Sovereignty over Natural Resources and the Enforcement of Stabilization Clauses', in *Yearbook of International Investment Law & Policy*, 2011–2012, ed. Karl P Sauvant (OUP, 2013), 311–344.

reference chosen by the parties to be incorporated into their contract."[3] With this form of freezing clause, the parties do not purport to restrict the host state's ability to change its laws, but instead agree as a matter of private contract that this '*lex specialis*' will govern their respective rights and obligations towards each other, irrespective of the host state's exercise of its sovereign powers.[4]

Inviolability This is often described as an 'intangibility clause,'[5] and might be viewed as a sub-category of the freezing variety above, with which it has similarities. It 'freezes' the contract rather than the law. Usually short and simple in its construction, it prohibits *unilateral* changes to the investment agreement and requires the consent of both parties before any changes may be made. Instead of indirectly restraining the state's legislative capacity to intervene at a later date by freezing the law applicable at the time of the contract signature, this form of stabilization tries to limit the state's capacity directly by requiring mutual consent to contract changes. By requiring mutual consent (in contrast to the freezing approach to stabilization), this approach has the advantage that it establishes a procedural mechanism for discussion – and probably negotiation – between the parties about the future of the agreement.

Another example is to be found in an agreement between the government of Yemen and a foreign investor in 1992, which reads:

> Contractor shall be solely governed by the provisions of this Agreement and [the contract] may be altered or amended only by the mutual agreement of the Parties.[6]

Adjustment There are contract clauses that address stability in a different manner, envisaging automatic adjustments or renegotiation of contract terms in the event of specified circumstances occurring. These stabilization provisions are described within this study as balancing clauses. Essentially, they stipulate that if the host state adopts a measure after the conclusion of the contract – a triggering event – that is likely to have damaging consequences to the economic benefits of the original bargain for one or both of the parties, a re-balancing has to take place. Petroleum contracts differ in their treatment of how that balancing will be made. On one view, the adjustment may be *automatic* or achieved in a manner stipulated

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3 Bertrand Montembault, 'The Stabilisation of State Contracts Using the Example of Oil Contracts: A Return of the Gods of Olympia?', *RDAL/IBLJ*, no. 6 (2003): 593–643 at 608.

4 An example is cited by Algerian scholar, Nour Eddine Terki, from a Sonatrach LNG Sales Contract (1975): "The law applicable shall be Algerian law as in force at the date when this contract is signed." *See* Nour Eddine Terki, 'The freezing of law applicable to long-term international contracts', *Journal of International Banking Law* 6 no. 1 (1991): 43–47 at 44.

5 Montembault calls it an inviolability clause: Montembault (2003) 615; *see also* in this context, Proper Weil, 'Les Clauses de stabilisation ou d'intangibilité insérées dans les accords de développement économique', in *Mélanges Rousseau* (Paris: Pédone, 1974) 301–329.

6 Article 18.2: *Mayfair Production Sharing Agreement between the Ministry of Oil and Natural Resources and Yemen Mayfair Petroleum Corporation* (Al Zaydiah, Block 22, Tihama Area), dated 29 July 1992.

in the contract so that the economic balance struck between the parties on the effective date of the contract is re-established. On another view, however, neither the manner of such adjustment nor a requirement that it should be the result of mutual agreement between the parties should be specified: what might be called the *open-ended* approach. This approach might result from the host state's refusal to agree to a more detailed clause. A third approach is to make express provision for the parties to enter into a *negotiating* process to identify which amendments should be made to the contract to permit a balancing of the economic core of the contract.[7] Inevitably, the large number of petroleum contracts in existence around the world allows for considerable diversity of approaches including hybrids of the ones outlined above.

All of these versions of balancing have one important feature in common: they do not seek to prevent a change in the law by the host state but rather seek to address the economic impact of such a change on the bargain originally struck and to establish a framework in more or less detail for its preservation. If there is a National Oil Company (NOC), it may (on an optimistic view) be expected to take an active role in promoting a solution on behalf of the foreign company in its discussions with the state party.

Secondly, if there is a trend towards an increasing use of balancing (and there is evidence that this is indeed so), it is not because such clauses are any more effective than the freezing variety in preventing expropriation. Indeed, by focusing upon the *effects* of host state actions, it would appear that they are implicitly recognizing the futility of any express prohibition on expropriation or any similar acts that could be said to fall within a state's sovereign capacity. Instead, they commit the host state to participating in a process in which the parties have stipulated, in more or less detail, that other adjustments must be made to restore the status quo or that a renegotiation has to take place with the aim of restoring the status quo. However, this aim is usually stated in fairly clear terms, sometimes with provisions on how damages might be calculated. The goal remains one of keeping the original bargain stable, not one of re-opening it.

Allocation of burden Another common form of stabilization involves the use of clauses that seek to allocate the burden created by an attempted unilateral change in the law. These clauses can take different forms but usually require the NOC to play the key role in burden sharing. Essentially, in the event of any changes in the legal framework that are applicable to the investment contract, such

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7 F C Alexander Jr refers to these three approaches as, respectively, 'Stipulated Economic Balancing', 'Non-Specified Economic Balancing', and 'Negotiated Economic Balancing': *see* 'The Three Pillars of Security of Investment Under PSCs and Other Host Government Contracts', Institute for Energy Law of the Centre for American and International Law's *Fifty-Fourth Annual Institute on Oil and Gas Law* (Publication 640, Release 54) (LexisNexis Matthew Bender, 2003).

as an additional tax, the clause shifts the burden of change in the fiscal regime (payment) to the NOC. In some versions, however, the burden may be shifted simply to 'the state.' This can happen at any stage in the potentially long life of a petroleum agreement.

Another example of such an express exemption is to be found in the Egyptian model concession agreement, which exempts the NOC and the foreign investor from all taxes and duties (Art XVIII (c)), except for income tax, which the NOC pays on behalf of the foreign investor (Art III (g)).

Asymmetry Inevitably, there are hybrid forms of stabilization clauses. Perhaps a more unexpected feature is that some stabilization clauses – of whatever variety – are expressly asymmetrical in character. They work to ensure that the contractor is protected from negative changes arising from state action and at the same time give the contractor a right to benefit from any positive changes after contract signature such as a reduction in tax rates or a more liberal approach to the recovery of costs in a Production Sharing Contract (PSC).[8] The effect of this contractual anticipation of both negative and positive changes in law is to create a 'one-way street' that works in the investor's favour if, at a later date, the government decides to reduce tax rates and broaden the tax base.[9]

2.3 The Practice of Stabilization Clauses

Diversity There is some evidence that scholars have significantly underestimated the plethora of clauses and approval procedures that states are prepared to accept if these appear conducive to providing legal support for a potentially long-term investment. In a much-cited article, Thomas Waelde and George Ndi noted many years ago a trend in energy industry practice towards the use of adaptation forms of stabilization clause and to forms which I have called 'allocation of burden.'[10] In

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8 Philip Daniel and Emil Sunley, 'Contractual Assurances of Fiscal Stability', in *The Taxation of Petroleum and Minerals: Principles, Problems and Practice*, eds. Philip Daniel, Michael Keen and Charles McPherson (Abingdon: Routledge, 2010), 405–424. The authors were at the time employed at the Fiscal Affairs Department of the International Monetary Fund (IMF), and as a result of its many missions made to member state governments had access to a multiple unpublished contracts.

9 The company protected by the stabilization clause "will be entitled to the reduced rates but may not be subject to the provisions that broaden the tax base. This can make future tax reform very difficult, especially if large contractors are protected by stability agreements that entitle them to all beneficial tax changes": Daniel and Sunley, 417.

10 Thomas W Waelde and George Ndi, 'Stabilizing international investment commitments: international law versus contract interpretation', *Texas International Law Journal* 31, no. 2 (1996): 215: "Instead of targeting the legislative power of the state founded on sovereignty, these commitments are designed to set up a contractual mechanism of allocating the financial effect of political risk to the state enterprise. Their nature is thus moving from that of a sovereign and state-related promise to a mechanism of commercial contracting with regard for the implications of damages for breach of obligation…" (p. 218).

each case, the evidence the authors gathered from industry practice, drawing upon contracts then available, showed that investors no longer considered it worthwhile to use 'static' or so-called freezing clauses which strive to prevent the state from modifying a bargain once concluded, even if it was made in different circumstances, with a host government that had different priorities in its policies. Instead, they noted that industry practice was attempting to build into the design of the long-term investment contract a mechanism that achieved two goals: first, it protected the investor and the investment from adverse changes made by the state as sovereign regulator, in contrast to its role as party to the contract, and second, it took into account any change in law or interpretation of the law by striving to achieve performance of the original bargain even if such change or interpretation, perhaps by a tax authority, were taken unilaterally. Crucially, these mechanisms did not attempt to prevent the exercise of sovereign power or to impose penalties on its exercise. Instead, the emphasis was upon the design of mechanisms that corrected any adverse material effects of such an exercise upon a single investment and restored the economics of the project to the *status quo ante*.[11] There was no attempt to prevent the state from taking the action if it chose to do so, although the economic consequences of doing so were set out in more or less detail. Of the two forms of stabilization above, the 'allocation of burden' variety is probably the neatest way of achieving this set of investor objectives. However, both kinds of clause are likely to secure a greater degree of acceptability on the part of host states than their more rigid predecessors.

What Waelde and Ndi could not have foreseen at the time – now more than a quarter of a century ago – was that investors would embrace this new approach to stability on the scale that they did. Instead of moving from one distinct type of clause to another, rejecting a 'traditional' approach in favour of a 'modern' one, the pattern in industry practice seems rather to have been to adopt a greater diversity in the kind of stabilization clauses, including the design of hybrid forms, and most strikingly, in some cases to include multiple forms of stability in the same contract. During negotiations, both the investor and the state, wearing a commercial hat, will have come to an agreement in which not one but several elements in the contract design combine to promote the stabilization objective. Indifferent to the kind of neatness favoured by scholars and commentators, this heterogeneous industry practice does not necessarily imply an inconsistency and may well be a practical approach to the management of a wide range of possible areas in which disputes may arise at some future date. In other words, the contract drafters may prefer to build redundancy into the contract: if one form of stabilization appears

[11] Another possible explanation for the shift in practice (which is not absolute) may be that the damages awarded by a tribunal would be less than the investor's expectations, while the balancing form of stabilization in its various forms would result in the investor being 'kept whole.'

unsuited to addressing a problem arising between the parties, then there is at least one other form available in the contract that may do so. This practice follows from the greater variety of choice which an investor now enjoys in its negotiations with a host government on this subject. An instance of this is the Anadarko-Sonatrach contract in Algeria.[12] Nor does this approach imply a rejection of 'traditional' clauses (by which is usually meant 'freezing') in favour of 'modern' ones, such as those balancing arrangements that include a goal of economic equilibrium or the allocation of burden ones.[13] If the parties agree during their negotiation to include several kinds of stabilization in their contract, and the result meets the formal legal requirements of the host state, then such agreements arrived at will be reflected in the final contract. After all, 'traditional' clauses are likely to be found useful and sought after by investors even if they are deemed a higher risk option for both parties – in terms of their long-term sustainability. The effect of including various mechanisms to achieve stability is to ensure that no significant part of the fiscal regime remains open-ended, allowing the investor to calculate its financial out-turn or cash-flow from the project, making assumptions about costs and profits which are essential to the decision whether to invest or not. Behind this shift in practice lies an awareness that it may be neither possible or desirable to try to bind the state for decades *not* to change its law, but rather quite possible to anticipate the effects of any such change on the investment under negotiation, to encourage an amicable resolution of differences, and to have the option of higher damages if the latter fails.

Impact of Negotiations Although standard forms and model contracts are commonly used in the energy sector as in many other fields of commerce, the negotiation that often takes place based on such contracts is lengthy and detailed,

12 The Agreement on the Exploration and Exploitation of Liquid Hydrocarbons between Sonatrach and Anadarko Algeria Corporation, 23 October 1989: https://www.resourcecontracts.org/contract/ocds-591adf-9645096819/view#/pdf. (last visited 20 September 2020). It contains a freezing clause, a renegotiation clause and an 'allocation of burden' or taxes deemed paid clause. Of course, in an arbitration proceeding it can be expected that the state or its energy company may argue that only one of these is a 'real' stabilization clause, and that what appears to be one is not or is in some way limited in scope or application.

13 The view set out here is different from that of several scholars and jurists, such as: Norbert Horn: 'Standard Clauses on Contract Adaptation in International Commerce', in *Adaptation and Renegotiation of Contracts in International Trade and Finance*, ed. Norbert Horn (Deventer: Kluwer, 1985), 111, 119: "modern mining agreements contain both stabilization or freezing clauses as well as clauses on adaptation and renegotiation…"; Georges R. Delaume, 'The proper law of state contracts revisited', *ICSID Review—Foreign Investment Law Journal* 12, no. 1 (1997); Dolzer and Schreuer, *supra* fn 2, 75–78; Piero Bernardini, 'Stabilization and Adaptation in Oil and Gas Investments', *supra* fn 2, 98. For a recent statement of this view, and evidence of its practical implications, *see* the Dissenting Opinion of Professor Stern in *Occidental Petroleum Corp., Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No AB/06/11 of 5 October 2012, para 12. As Professor Charles Leben says, however, the readjustment clauses to which Delaume and others refer are usually found in contract clauses with the heading 'stabilisation': *The Advancement of International Law* (Portland: Hart Publishing, 2010), 159, note 137.

resulting in a complex and individually tailored commercial agreement. Given the number of negotiable items that need to be hammered out, each negotiation is unique and different from any other, even if it starts from similar or identical contract formulae. In the oil and gas sector, it can take a couple of years to finalize such a text.[14] Even if the structure remains the same as the original model, it would be surprising if the outcome is not different in some important respects. One aspect that has been identified is the extensive role of asymmetry of benefits in contract design, with some states agreeing to both a positive and a negative stabilization, creating a 'one way street' of benefits to the investor. For the researcher,[15] this contract realm has been hard to access given the commercial conventions about confidentiality. However, access to this contract practice has become far less restricted with the establishment of sites that publish contracts online,[16] and the promotion of transparency by governments, international organizations, civil society groups and industry itself. As a result, data is now available to the researcher that is much richer than in the days of Prosper Weil, when he had to base his seminal work on legal stability on a sample of contracts obtained through his own legal practice, and a few that were in the public domain. In this article an effort has been made to draw upon some of the many final contracts that are now available, and so to base an analysis on the final text. This can illustrate and support the above points about contemporary stabilization. This increased transparency also helps to highlight the differences between models and negotiated outcomes and underline the range of pragmatic choices made by the parties.

Form and Procedure There is also an institutional aspect to the practice of contract stabilization. If the contract is concluded between the investor and a particular state agency, perhaps involving other parts of the executive as well, and parastatals such as national energy companies, there may be advantages in securing approval of the final contract by the legislature. This procedural approach to legal stability is adopted as standard practice in Egypt and Ghana, for example.

This role played by procedure in relation to contract stability leads to another aspect: the interplay with institutions. Again, reference may be made to the Anadarko contract, with its interplay between contract protection and the legislation on which it was based and further its use of a Protocol with the state as an approving instrument. In this sense, the stabilization clause becomes part of a

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14 The natural resources will also impact on the fiscal and other commercial terms on matters such as whether they involve high risk exploration in new areas; low risk exploration in mature areas; frontier, onshore, shallow water or deep water development; high cost or low cost resources; oil prone or gas prone areas; or a large or small resource base, for example.

15 To the extent that the researcher is aware of this feature at all: little is written about it even though it is readily identifiable in investment agreements in the oil, gas and mining sectors.

16 For example, www.resourcecontracts.org.

package of negotiated and legislative legal instruments, involving the state, the state energy company and the investor.

Testing Stabilization Clauses As is well-known, the classical arbitration awards based on contract largely relate to tests of stabilization in the face of events such as outright expropriation that are marginal today. There have been few tests of stabilization clauses before tribunals in commercial arbitrations, but the results have not taken our understanding of their legal significance forward much other than to provide further support for the conventional wisdom that stabilization clauses will be enforced by international tribunals. The reasons for this lack of a clear legal development include the willingness of parties in oil and gas disputes to settle their differences before an award is reached. Another is the complexity of disputes, meaning that a stabilization clause is only one element in a series of claims and calculations by the parties. An example of the former is the dispute that emerged between Anadarko and Algeria some years ago concerning the above-mentioned Anadarko contract. When the Algerian Government sought to change its hydrocarbons regime in a way that would increase its share of revenues at a time of rising oil prices, Anadarko Petroleum Corporation, relying on its stabilization clauses, challenged the action before an international arbitral tribunal. One report claimed that the compensation sought was around US$11 billion.[17] However, while these and other investors had the right to take their claims to international arbitration (following an attempt at conciliation), none of the disputes appear to have reached a final award by an international tribunal; all appear to have been – ultimately – concluded through a commercial agreement between the parties. There was therefore no arbitral ruling on the alleged breach of any of the stabilization clauses discussed above.

An example of the latter – the impact of complexity of oil and gas disputes on a tribunal's assessment of a stabilization clause – can be derived from the *Erha* arbitration in Nigeria. In 2009 the Nigerian subsidiaries of Esso and Shell initiated an arbitration against the Nigerian National Petroleum Corporation (NNPC) over the interpretation and performance of certain provisions in a PSC entered into in 1993.[18] The claimants argued that the PSC contained clear provisions that regulated the allocation, nomination and lifting (loading onto an oil tanker) of crude oil, and that NNPC had breached these by denying the claimants' right to allocate, nominate and lift crude oil and by unilaterally and repeatedly lifting crude

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17 GAR, 24 August 2009: 'Algerian oil-tax gives rise to ICSID and contract claims'.

18 *Esso Exploration and Production Nigeria Limited and Shell Nigeria Exploration and Production Company Limited v Nigerian National Petroleum Corporation*, Final Award, 24 October 2011 (*Erha* Award). By this time the consortium had invested over US$6 billion in the project: US District Court Southern District of New York, Petition in Civil Action, No. 14cv8445, Opinion & Order (the award was attached to the petition for enforcement submitted to the US court).

oil to which it was not entitled. The stabilization claim emerged during the arbitration, rather than being fully fledged at the outset. The clause formed the basis for an alternative and an additional claim to the primary claim that "the law remains in all material respects as it was or was agreed to be on the effective date of the PSC" and the conduct of the tax authority, the Federal Inland Revenue Service (FIRS), in relation to PTT (a petroleum tax) did not alter this position.[19] The alternative claim was based on events occurring only days before the submission of the Notice of Arbitration. The FIRS had issued a Notice of Assessment to the claimants for 2008 PPT, which in the claimants' view was based on erroneous calculations and constituted a change in practice from the FIRS' previous approach.[20] Subsequently, the 90-day negotiation period in the stabilization clause (Clause 19.2) was triggered by the claimants, but NNPC informed them that no meaningful negotiation of the issues could be held unless the ongoing arbitration was withdrawn or suspended.

By majority[21] the tribunal found that the four requirements to trigger a stabilization claim had been met:[22] there had been a change in policy when the authorities ceased to apply a tax credit or to deduct certain heads of costs; the change pertained to a Government department or agency; it had a material adverse impact on the claimants; and the parties were unable to agree on a modification of the PSC to compensate the claimants within the 90-day negotiation period. However, since the claimants were granted the primary claim, the alternative claim under the stabilization clause was dismissed (to avoid double recovery). Nevertheless, the tribunal did grant relief under the claim based on the stabilization clause, to prevent future overlifting by NNPC based on the changes in the FIRS' policies. It did so by ordering the PSC to be modified with language that provides that future profits be made available to compensate Esso and Shell for the future impact of the breaches by NNPC.[23] For past impacts, compensation could derive from NNPC's breaches in oil allocation. The Claimants' valuation of US$1.8 billion in losses was not contested by NNPC.[24]

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19 *Erha* Award, para 327.

20 *Erha* Award, para 105.

21 There was a Dissenting Opinion by Professor Paul Obo Idornigie, for whom the claimants' invocation of rights under Clause 21 (arbitration) meant a waiver of rights under the stabilization clause (which required a negotiation), since they could not be invoked concurrently, in his view; further, the 90-day notice period started earlier than alleged by claimants, and was not complied with.

22 *Ehra* Award, paras 346-367.

23 *Ehra* Award, para 370.

24 Subsequently, the award was set aside at the seat of the arbitration in Nigeria. The local court found that the lifting dispute was a tax matter and so not arbitrable under Nigerian law. On appeal, the Nigerian Court of Appeal restored the parts of the award that found that NNPC had overlifted, and improperly prepared its tax returns, on the ground that these claims were contractual in character, but would not award damages. It also found that the claimants had essentially waived their argument based on the stabilization clause. The claimants commenced enforcement proceedings in the US courts: *Esso*

The saga of legal events in the *Erha* case illustrates more than legal complexity – a stabilization claim intertwined with a primary claim, each with distinct procedural requirements. It demonstrates the risk that an award favourable to a claimant may not ultimately be enforceable and, linked to this, that the enforcement stage might prove very costly to many claimants. That said, it also supports the view that a determined claimant may draw upon the global adjudication system to pursue confirmation of an award, with the option of a denial of justice claim to address a set aside at the seat. There is also the positive feature of a tribunal ordering changes to the contract as a way of providing relief to the claimant under the stabilization clause.

A caveat to the continued support of stabilization clauses by tribunals may be added however. It is well-known that governments seek to limit their scope through 'carve-outs,' such as public health, environment and safety matters. For fiscal stability, the parties may go to great lengths to list the various taxes that are covered by the stability provision. Given the importance of national measures in responding to the environmental challenges that are often addressed in international initiatives such as the Paris Agreement, the precise definition of the items to be included in the scope of a stabilization clause assumes greater significance. A tribunal may distinguish the stabilization clause and hold that an environmental tax or charge is not included in the clause's scope, making the clause inapplicable in an instant case.

2.4 Stabilization by Contract Today

The risks of unilateral action by host states remain as significant for investors today as ever before and are evident among various regions around the globe. We might even hypothesize that they represent a *structural* feature of the investor-state relationship in the oil and gas sector, so permanent do they seem. For that reason, the provision of a stabilization clause holds out the prospect of additional security, especially important if project finance is sought. However, an over-eager willingness on the part of host governments to offer such security may easily arise from a policy of investment promotion and a lack of full appreciation of the commitment that is being undertaken, leading to demands for renegotiation later. A prudent investor would be wise to ensure that contract enforcement mechanisms are soundly drafted.

Exploration and Production Nigeria Limited, et ano., against Nigerian National Petroleum Corporation, Case 1: 14-cv-08445-WHP, Opinion & Order, US District Court Southern District of New York (the court declined to confirm the award).

Indeed, several states continue to offer stability in the form of 'freezing' obligations in the contract. However, given the high risk of unilateral action at some future date this is an unreliable protection mechanism on its own. Perhaps in recognition of this, the consensus among observers that economic balancing is now more usually favoured by states is one that surely carries some weight, often involving as it does, negotiations between the parties about the result in the event that differences arise. However, it adds weight to the question of whether such clauses will be recognized and enforced by international arbitral tribunals in treaty based cases.

3 STABILITY AND THE INVESTMENT TREATY FRAMEWORK

Arguably, the highpoint of influence for the contractual stabilization clause was several decades ago when the available instruments for foreign investors' protection were far fewer than today. In the classical period of awards, including those from the Libyan oil cases and *Aminoil*, the claimant in the arbitration was an investor which had based its protection on contract and the relevant provisions therein. The principal change in the legal landscape for investor protection is the availability of protection under investment treaties. To achieve this, an investor has the option of becoming a covered investor under a Bilateral Investment Treaty (BIT) or other International Investment Agreements (IIAs) and taking advantage of its option to take any breach of its provisions to international arbitration. In barely three decades this form of protection has acquired a remarkable influence on the international investment scene.[25] However, the contract-based form of legal stability remains, and continues to figure in model contracts offered by states. Has it been superseded by the newer form of protection?

There are two principal and well-known advantages for the investor. The first is the access to substantive protections such as a guarantee of Fair and Equitable Treatment (FET), prohibition on expropriation without compensation, whether directly or indirectly, and prohibition of discrimination. FET has come to be commonly used as the basis for investor claims in preference to reliance on provisions expressly prohibiting expropriation. The second is procedural: the state's open offer to all covered investors of consent to international arbitration for claims that may be brought against it by foreign investors. However, the treaty protections offered by FET are subject to interpretation by tribunals which often take widely different views of the guarantees in a particular case. The tribunal has to consider the source of an expectation of stability, the investor's reliance upon it, as well as

[25] As of 1 January 2020, the total number of known ISDS cases based on IIAs had reached 1,023, with 120 countries as respondents in these claims: UNCTAD IIA Issues Note, Issue 2, July 2020.

the timing and nature of the investment play an important part to form a view of whether the claimant's expectation of stability of the legal framework was legitimate and reasonable at the time the investment was made.[26] This is where the familiar, contract-based stabilization makes an entrance. A number of investment treaty cases have demonstrated that the protection given by a treaty will be strengthened if the investor has already negotiated a stabilization clause in the investment agreement with the host state. If an investor has based its expectation on such a clause, the kind of analysis just outlined becomes largely superfluous for the tribunal.[27] Among many examples, the tribunal in *Total v Argentina* observed that an expectation would be "undoubtedly legitimate" if it were based on a stabilization clause.[28] In *AES v Hungary* the tribunal took a similar view: a stabilization clause "… could legitimately have made the investor believe that no change in the law would occur."[29] The essential idea is summarized by the tribunal in *Perenco v Ecuador*: "the Tribunal would have little difficulty holding that a fully stabilized contract that did not admit of any future or other change cannot be changed unilaterally…."[30] However, the *absence* of a stabilization clause in the underlying investment agreement has led some tribunals to conclude that a breach of legitimate expectations did not take place.[31] One caveat to this analysis and conclusion is that it is unclear if it would apply equally to all the stabilization clauses that are in use in investment agreements such as oil and gas contracts.[32]

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26 *Tecnicas Medioambientales Tecmed SA v Mexico*, Award, ARB(AF)/00/2, IIC 247 (2003), 10 ICSID Rep 130, 29 May 2000, 154; *Occidental Exploration and Production Co v Republic of Ecuador*, Final Award, LCIA Case No UN 3467, IIC 202 (2004), 1 July 2004, 185; *LG & E Energy Corp & ors v Argentina*, Decision on Liability, ICSID Case No ARB/02/1, 3 October 2006, 127. Tribunals are often concerned to emphasize that the guarantee of legal stability does not mean an effect of 'freezing': the doctrine of legitimate expectations does not mean "the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life": *EDF (Services) v Romania,* ICSID Case No. ARB/05/13, 8 October 2009, para 217.

27 *Parkerings Compagniet AS v Lithuania*, Award, ICSID Case No. ARB/05/8, IIC 302 (2007) 14 August 2007; also, *Yuri Bogdanov & Yulia Bogdanova v Republic of Moldova*, Final Award, 16 April 2013, SCC Arbitration No.: V (091/2012), para 187; and *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegz Company v The Government of Mongolia*, Award on Jurisdiction and Liability, UNCITRAL, 28 April 2011, para 302.

28 *Total v Argentina*, Decision on Liability, ICSID Case No ARB/04/1, IIC 484 (2010), para 117.

29 *AES Summit Generation Limited and AES-Tisza Eromu Kft. v Republic of Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, para 9.3.31.

30 *Perenco Ecuador Ltd. v The Republic of Ecuador*, Decision on Remaining Issues of Jurisdiction and on Liability, ICSID Case No. ARB/08/6, 12 September 2014, para 593.

31 *Charanne B.V., Construction Investments S.a.r.l. v Spain,* Final Award, 21 January 2016, para 490; *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Kingdom of Spain*, ICSID Case No ARB/13/37, Award, 4 May 2017, para 362; *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* [1], ICSID Case No. ARB/05/20, 11 December 2013, Award, para 529 ("The BIT's protection of the stability of the legal and business environment cannot be interpreted as the equivalent of a stabilization clause").

32 This interesting sub-theme is addressed by Dr Rahmi Kopar in his book, *Stability and Legitimate Expectations in International Energy Investments* (Hart Publishing, 2021), chapter 6.

A second qualification to this opportunity of legal redress by investors is practical and relates to the process itself. Experience to date suggests that the exercise of the right to make a claim by an investor is a decision to commence a process that can be lengthy and complex: there is no guarantee that a state will pay, even if the final award is favourable to the claimant. In terms of quantum, the amounts awarded may be large relative to those typically found in non-energy sectors, but they have generally been much less than those claimed and may be reduced further if challenged.[33] The lack of uniform standards in awarding damages means that tribunals are free to choose their own valuation standards, leading to diverse methods and contradictory decisions. It is notable then, but perhaps not surprising, that while certain investors appear in arbitral proceedings several times, many more appear only once. States may fail in objections to a claim at the jurisdictional stage but enjoy success on the merits of a case, at least in part, limiting damage exposure to acceptable levels. Some states have persuaded tribunals to reject investor claims that allege interference with investments by local administrative authorities or by regulatory agencies; and tribunals have found that such interference did not rise to the level of an international treaty violation.[34]

Protection of the stability of an investment by the investment treaty regime has to take into account not only these practical features but also the impact of 'systemic' ones on the evolution of relevant doctrine. Investment treaty law develops in a case-by-case manner, a feature evident from the treatment of FET and legitimate expectations, both of which are of very great importance for claims based on an expectation about the stability of long-term investments. Initially, this was drawn upon widely by investment tribunals to accord considerable protection to investors and their expectations of stability.[35] More recently, despite inevitable differences among arbitrators about the scope of FET, tribunals will not usually understand FET as according an investor protection equivalent to a contractual right such as that given by a stabilization clause. It can be used to determine the

[33] *For example*, PwC studies of international arbitration have concluded in 2017 and 2015 that the disparity in valuations between claimants' valuations and tribunal awards is high, so that the overall average award as a percentage of the total amount claimed was 36 per cent and 37 per cent respectively. A later study of ICC commercial awards produced a much higher average figure of 53 per cent "significantly more than the 36% noted in the PwC Studies of investment treaty awards": PwC/Queen Mary University of London, *Damages Awards in International Commercial Arbitration: A Study of ICC Awards*, December 2020.

[34] *EnCana Corp v The Republic of Ecuador*, UNCITRAL, LCIA No UN3481, Award, IIC 91 (2006), 3 February 2006 (rejecting jurisdiction over all claims arising out of Ecuadorean tax regulations denying VAT credits and refunds, except an expropriation claim, which the tribunal denied on the merits).

[35] This was especially evident in various Latin American awards involving Argentina: for example, *Sempra Energy International v Argentine Republic,* Award and partial dissenting opinion, ICSID Case No ARB/02/16, IIC 304 (2007), 28 September 2007: the tribunal emphasized that "[w]hat counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the protection sought by the treaty" at para 300.

scope of compensation, but it needs to be set against the state's legitimate interest in policy formation and implementation. This process of evolution in doctrine continues to impact on claims against states arising from investments in the energy sector, now understood to include renewable forms of energy as well as other more traditional ones, such as oil and gas. In recent years, this evolution in case law has included a notable expansion in the number of awards resulting from claims based on the Energy Charter Treaty (ECT).

If the evolution of doctrine on FET has been in the direction of becoming more restrictive in its interpretation of stability, the origin may lie in the wave of investment disputes that has swept over states, whether in the Global North or the Global South. This has fueled accusations about unfairness or bias in favour of claimants in the treaty-based international investment regime.[36] Evidence of this is found much less in the actions by states to withdraw from or terminate BITs or other IIAs, which have been relatively modest in number, but rather in persistent demands for reform or modernization. In energy investment, this has affected both the ECT and the North American Free Trade Agreement, with the latter being swept away in favour of a successor instrument that is barely relevant in energy terms. The decisions of several states to withdraw from parts of the system have been widely publicized. This includes actions by Tanzania, Indonesia, Italy, South Africa, and at an earlier stage, Bolivia, Ecuador, Russia, and Venezuela. These formal steps have had only limited, symbolic significance, countered by the growing number of accessions to ICSID and the New York Convention by small, investment-hungry states. Most states, particularly new ones, continue to need capital in their energy economies, irrespective of their country's energy mix or policies on growth and development. The offer of stability is particularly important in signaling an interest to attract international energy investment, and a commitment to concluding investment treaties is one way of supporting that offer. Energy – both traditional and new – remains an economic sector in which the state is heavily involved, often giving disputes an extremely sensitive, quasi-political character. With international arbitration, there is a political gain for states in 'legalizing' a matter that is probably already a sensitive one. If the award ultimately disappoints, the state can escape blame by noting the decision was taken by an independent tribunal.

There are many examples to support the proposition that this is a framework that leads to balanced results in favour of states *and* investors. If it were to do otherwise, it would surely have little hope of long-term sustainability. However, it may be asked whether the advent of this pillar of legal stability – still comparatively

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36 There are many examples: a recent one is the polemical essay by M. Sornarajah, 'Resistance and Change in the International Law on Foreign Investment', Cambridge University Press, 2015.

recent – has contributed such protection to the oil and gas investor that it may be supplanting the familiar stabilization clause. To date, the answer would appear to be in the negative. The investment treaty 'system' is after all highly atomized and multi-layered, offering diversity and versatility, but also abundant potential for gaps, inconsistencies, and incoherence. The doctrine of FET and within it the doctrine of legitimate expectations offer protection to an investor who has relied upon assurances from the host state about the stability of the legal and business framework. However, the application of the legitimate expectations test in a particular case requires the arbitral tribunal to examine the *source* of the expectation, the *reliance* placed by the investor on it (was it reasonable; was due diligence carried out), the degree of specificity of the expectation (the connection between it and the investor), and that will exclude an expectation based on the general legal framework. Hence, the protection of a claim based on a guarantee of legal stability has to leap over several hurdles. Success is not guaranteed. In practice, this depends inevitably on the wording in the relevant BIT, the fact pattern in the dispute, and so on, if protection is to follow.

The first set of tests to this protection came with the Argentinian cases about energy utilities in the early 21st century, based on diverse BITs, while the second set have been based largely on the ECT, involving renewable energy cases and occurring since 2015. The diverse approaches evident in the many renewable energy cases involving Spain demonstrate how varied the interpretations of this factor can be. What is offered is neither in law nor in predictability classifiable as a stabilization clause.

To date, what emerges from the various awards is that there appears to be a consensus that where a stabilization clause exists in the contractual or administrative instrument, the investor has a firm basis for an expectation of stability and, if disappointed, has an expectation of appropriate damages. What is deemed to be a stabilization clause may prove to be disputed, however.[37] In its absence, tribunals have been required to ask whether there is an alternative source for expectations. For example, in *Charanne*, the tribunal sought an 'equivalent' commitment directed at the investor, arguing that the regulatory framework itself could not fulfil that role. Their conclusion was that

[37] The disagreement among the parties in *Occidental v Ecuador* (II) about legal stability is only one example of this. Scope for differences of opinion is increased by the tendency among many arbitrators to understand 'stabilization' as limited to freezing. If adaptation is envisaged at a later date in a change of law clause – the balancing, equilibrium or renegotiation variety, discussed above – the parties must have accepted that laws can change, on this view. The limits imposed by the parties on the scope of a particular form of stabilization, to cover certain types of tax only, for example, is a further way in which a clause can be distinguished so as to become irrelevant to a dispute: *see Bogdanov v Republic of Moldova* (2013) *supra* fn 27, for example: environmental charges were not covered by the fiscal stabilization clause.

> in the absence of a specific commitment, the Claimants could not have a reasonable expectation that the regulatory framework established by RD 661/2007 and RD 1578/2008 remain unchanged.[38]

In countries with a fluid socio-economic context, the penalty for investors failing to include a stabilization clause in their agreements with states or state entities in such volatile circumstances was emphasized in the *Paushok v Mongolia* case (2011). The tribunal stated that an investor had no immunity from windfall profit taxes in the absence of a tax stabilization clause:

> ... foreign investors are acutely aware that significant modification of taxation levels represents a serious risk, especially when investing in a country at an early stage of economic and institutional development. In many instances, they will obtain the appropriate guarantees in that regard in the form of, for example, stability agreements which limit or prohibit the possibility of tax increases. As a matter of fact, GEM attempted, although without success, to obtain such an agreement in 2001, a few years after Claimants' initial investment and, in 2002, Vostokneftegaz – a company controlled by Claimants – did secure a stability agreement on a certain number of taxes. In the absence of such a stability agreement in favor of GEM, Claimants have not succeeded in establishing that they had legitimate expectations that they would not be exposed to significant tax increases in the future.[39]

This may be a relevant consideration in contexts wider than that of a post-conflict society or transitional economy. By analogy, it may be applied to that of a country that has embarked on a programme of rapid reform of a stagnant energy market to attract investment, or a series of reforms associated with a policy of transition to a lower carbon economy.

In conclusion, it may be said that, whatever its merits, the investment treaty system is unlikely to have the effect that the first pillar, the contract-based form of stabilization, becomes a redundant instrument in an investor's risk mitigation strategy. The overall legal environment is richer and generally more positive for investors than ever before. An investor is now likely to consider the merits of *both* treaty and contract-base strategies in making its claim. Moreover, the current, highly inter-dependent economic relations in energy and indeed the wider economy would seem to have encouraged many host states and their investors to avoid the high-profile confrontations of the past – with a few notable exceptions. This is a process in which settlement is high on the list of the parties' objectives, and a stabilization clause has obvious advantages in this negotiation process – as would a Legal Stability Agreement, common in Latin America but also in mining

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38 *Charanne*, *supra* fn 31 503 (and 499), citing *Electrabel*, and early Argentinian cases such as *CMS* and *El Paso: CMS Gas Transmission Company v Argentina*, Award, ICSID Case No ARB/01/8, IIC 65 (2005), 12 May 2005; *El Paso Energy International Company v The Argentine Republic*, Decision on Jurisdiction, ICSID Case No ARB/03/15, 22 April 2006.

39 *Paushok v Mongolia*, *supra* fn 27, para 302.

regimes in other parts of the world – if the investor has been able to obtain one from the host state. In many cases, the availability of these legal instruments concerning legal stability has proved to be valuable in ensuring that the resulting negotiations between the parties achieve an outcome that is better for the investor than might otherwise have been possible.

4 STABILITY BY NATIONAL LAW

If contract stabilization has another competitor for investors' attention as a source of long-term legal security, it is an older form of legal stability: the domestic legislative protection. This pillar of legal stability for energy investments – the third in our perspective – is of less recent origin than the investment treaty framework, and perhaps has received less attention than it deserves.[40] Arguably, in the era of investment treaty law, it has acquired a greater practical significance.

For many years, governments seeking inward investment have included a provision in domestic legislation that would have the character of stabilizing the foreign investment. Typically, such provisions will have a general character in an investment law or in dedicated energy (or mining) legislation. However, it is also possible that the legislation may be designed to apply, effectively or deliberately, to a particular investment, especially if this is large in scale and in its potential impact on the host country's economy.[41] States as different as Nigeria and Timor-Leste provide examples of this approach.

A closer review of this legal guarantee reveals pitfalls for unwary investors and potential shortcomings in effectiveness. In a general investment law or a sector-specific law such as a hydrocarbons law, it can take the form that closely resembles that of a stabilization clause in an investment agreement. An example is the clause in the 1994 Kazakh Law on Financial Investments, later repealed. In this case, the wording ensured that the investor would retain the legal conditions applicable to the investment at the time it was made for a period of ten years, even if there was a change in law, and enforceable by international arbitration. Although this provision was upheld in a subsequent arbitration concerning the capping of electricity tariffs, it contains several notable features that can limit the value of such

[40] There are exceptions, however: for example, A F M Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective', *J of World Investment & Trade* 8, no. 2 (2007): 234–241.

[41] *See for example*, the Nigeria Liquefied Natural Gas (NLNG) Decree 1990, Second Schedule, paras 2 and 6. In *Niger Delta Development Commission v Nigeria Liquefied Natural Gas Company Ltd*, judgement of Justice RO Nwodo in FHC/PH/CS/313/2005 dated 11 July 2007, the court confirmed the validity of the Decree in relation to the Nigerian Constitution. *See* Bayo Adaralegbe, 'Stabilizing fiscal regimes in long-term contracts: Recent developments from Nigeria', *Journal of World Energy Law & Business* 1, no. 3 (2008): 239.

guarantees. First, there is the duration. At ten years this is relatively short for an energy investment project. It recalls the duration commonly agreed by some in stability agreements offered by some Latin American governments. It is not inevitable that a domestic law will limit the duration of a guarantee in this way, but it may be that a government would have difficulty in securing legislative approval for a period much longer than this. In cases where that has been sought, in Israel and Nigeria, it has led to judicial challenges – and not only to the duration offered to the investor. Second, it is a general provision and not aimed at any particular investor or investment. This has implications for how an investor might form an expectation about the stability of its investment, particularly in societies undergoing radical change. Indeed, in the Kazakh example, it could reasonably be argued that at the time the 1994 Law was adopted, the newly independent state was still at a very early stage in its understanding of international investment law and that an investor's expectations should take that factor into account when making the investment (and discounting the level of protection it offered). A way of addressing the lack of specificity in the provision might be to provide the investor with a supplementary law that expressly refers to the investment itself. Third, the provision itself requires support from other provisions if it is to achieve an effect similar to that of a contract-based guarantee. For example, it needs to address or be linked to provisions addressing applicable law and the venue of arbitration in the event of a dispute. If the law is wholly that of the host state and international arbitration is lacking, the value of its guarantee that the state will not act unilaterally to undermine the economics of a project will be significantly diminished. There are plenty of examples of what one observer calls the "vagaries of litigation in the state party's domestic courts, such as lengthy and inefficient court proceedings and the real or perceived bias of domestic courts in favour of their government."[42]

Considerations such as the above have understandably fostered some scepticism among commentators about this form of legal stability, with Waelde and Ndi declaring that "a stabilization promise made only in legislation is not sufficient to assume an explicit, formal, and binding stabilization agreement."[43] This is in a narrow sense correct. It is also in line with an older, pre-investment treaty world, in which such guarantees in national legislation constituted one of only two pillars to legal stability. Now, one may argue, its form and precise

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42 Stephan W Schill, 'The Interface between National and International Energy Law, in *Research Handbook on International Energy Law,* ed. Kim Talus (Edward Elgar, 2014) 44–76 at 70. The setting aside of the *Erha* arbitral award by Nigerian courts (discussed in 2.3) above, is only one example of this phenomenon.

43 Thomas W Waelde and George Ndi (1996), *supra* fn 10, at 240.

wording may prove significant in the context of an investment treaty claim.[44] It is highly unlikely that an arbitral tribunal would fail to consider it in a claim. Moreover, if such a legislative guarantee is available, it may prove to be a valuable addition to a contract-based guarantee of stabilization, and a factor in determining damages if the state "subsequently revokes or ignores those same legislative promises of stability."[45]

A procedural rather than a substantive guarantee is also available to investors in the domestic law of some states, whereby national legal processes to approve final investment agreements are utilized to give the contract between state and investor the force of a municipal law. Such procedures do not usually preclude the inclusion of any or many forms of stabilization clauses and an international arbitration provision in the contracts themselves. They are merely an additional form of assurance and as such likely to be viewed as valuable by the international oil and gas investor.

5 DO STABILIZATION CLAUSES MAKE SENSE FOR FUTURE ENERGY MARKETS?

Given the pressures on states to meet environmental and social challenges, is it realistic to expect them to offer clauses that seek to stabilize a bargain struck with an international investor for the next 20 to 30 years? Indeed, are stabilization clauses necessary in the oil and gas sector in the present context?

There are at least two responses to such questions. The first is to state the obvious. At present, there are many thousands of contracts in the international oil and gas sector of the world economy that contain one or more kind of stabilization clause. For the foreseeable future such contracts will govern oil and gas operations, to the extent that there is a market for these commodities. The issues discussed in this article about the three pillars of legal stability, their interaction, and the implications of various kinds of stabilization clause seem likely to be with us for many years to come. For governments to make changes to the terms of these contracts with adverse economic consequences for existing investors, provision needs to be made to meet the legal consequences since their protection in international law seems beyond doubt.

Looking to the future, the picture cannot be the same. The subject matter of energy investment law is undergoing a significant change. At a macro-level, there is a major change in public preferences and in political, social, and economic orthodoxy with policy interventions sought to reduce the negative impacts of

44 *For example*, *Bogdanov and Bogdanova v Moldova*, 16 April 2013, *supra* fn 27, paras 184–192, 195, 207 (where the stabilization clause was in a foreign investment law of the host state).

45 *Ibid*.

CO_2 emissions. Such sweeping changes are not unfamiliar in the energy sector: privatization and deregulation in the 1990s proved disruptive to existing legal frameworks but in the medium to long term had many positive impacts. In this instance, however, the energy sector itself is deemed to be part of the wider problem and is therefore embedded in or the target of these policy shifts, and the legal measures chosen to implement them. Supporting this shift is the multilateral accord, the Paris Agreement on climate change mitigation, that will require sweeping changes by national and regional governments at the level of municipal law, creating challenges for the long-term stability of energy projects. However, even if the balance of energies in the energy mix changes significantly in the coming years, the need for international investment in the oil and gas sector seems highly unlikely to cease.

In this context, an investor cannot argue that its investment was made on the assumption that circumstances would not change over the long term, or that public policy would not evolve. However, the examination of stabilization clauses in this article has hopefully demonstrated the diversity and dynamism that characterizes the modern suite of stabilization clauses, offering ample opportunities for states to 'carve-out' areas of actual or potential sensitivity in domestic policy. Moreover, stabilization clauses are only one form of guaranteeing long-term stability among several, suggesting an underlying commercial need that the law must respond to. In the energy sector, where investments tend to envisage a longer duration than most, with larger up-front costs, an international character and a degree of complexity and technical sophistication, there are a multiplicity of forms of legal stability to support the various kinds of investment, ranging from contractual obligations, treaty protections, domestic legislative commitments, assurances, and representations by government, and in the regulatory frameworks and licences offered by host states. In meeting this commercial need for stability, this contractual device has demonstrated a greater flexibility than its critics expected, and therefore seems likely to remain part of the legal toolkit for investors and states when making the large investments the global economy will require in the years ahead.